Nos. 11,538 and 11,539

United States
Circuit Court of Appeals

For the Ninth Circuit

EL DORADO TERMINAL COMPANY, a corporation,
Appellant,

v.

GENERAL AMERICAN TANK CAR CORPORATION, a corporation;
GENERAL AMERICAN TRANSPORTATION CORPORATION, a corporation,
Appellees.

No. 11538

EL DORADO TERMINAL COMPANY, a corporation,
Appellant,

v.

GENERAL AMERICAN TANK CAR CORPORATION, a corporation,
Appellee.

No. 11539

BRIEF FOR APPELLEES

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BRIEF FOR APPELLEES

Foreword

In this litigation—which has now been in progress for more than twelve years—the appellant is seeking the recovery of certain sums of money which the Interstate Commerce Commission, by an order approved on the merits by the Supreme Court of the United States, has held would "constitute a rebate and discrimination and involve a departure from the tariff rules applicable," in violation of the Elkins Act and the Interstate Commerce

Act. The Supreme Court has also held, in specific and unmistakable language, that the question whether the payment sought would be lawful or unlawful was a question committed by law to the Interstate Commerce Commission for determination—"and not for determination by a court." No other question is at issue in these cases. Upon this state of the record, the District Court concluded that the litigation should end and accordingly ordered judgments to that effect.

Appellant is here complaining of those judgments on the ground that the District Court should have proceeded to trial upon the question of the lawfulness of the payments demanded by appellant. That issue is the same issue which the Supreme Court has held the District Court could not try. It is the same issue which the Supreme Court has held to be within the exclusive jurisdiction of the Interstate Commerce Commission. It is the same issue which the Interstate Commerce Commission has in fact heard and determined. And it is the same issue on which the Supreme Court has held that the Interstate Commerce Commission's determination was correct!

Undoubtedly it would have been reversible error for the District Court to have attempted to retry that issue. Its orders and judgments refusing to do so are manifestly correct.*

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*Appellee General American Tank Car Corporation has been dissolved and all of its assets have been acquired and its liabilities assumed by Appellee General American Transportation Company (R. 95, 99), but under the law of the state of its incorporation (West Virginia) the dissolved corporation may continue litigation in its own name. For convenience in this brief we shall refer to both companies as "appellee" unless otherwise indicated. Likewise the appellant and its assignor El Dorado Oil Works will both be designated by the term "appellant."

The printed Transcript of Record in these appeals will be cited as "R. ....."

Pleadings, Proceedings and Jurisdiction

We agree in substance with the statements under this caption on page 2 of Appellant's Opening Brief.

Chronology

Inasmuch as this litigation is now in its thirteenth year and has been heard and decided so many different times by so many different tribunals, we set forth here, for the convenience of the Court, a brief chronological outline of the proceedings to date, with names and citations of the six reported decisions heretofore rendered:

1935—Complaint filed in the District Court in the first assumpsit action (No. 11539 herein).

1936—Stipulation of factual matters filed in the first assumpsit action (R. 29-32 herein).

1937—Complaint filed in the District Court in the second assumpsit action (No. 11538 herein).

1937—Trial of first action in District Court. Judgment for defendant.

1939—Judgment of District Court reviewed and reversed by this Court. *El Dorado Terminal Co. v. General American Tank Car Corporation* (C.C.A. 9th Cir., 1939), 104 F.(2d) 903.

1940—Judgment of this Court reviewed and reversed by United States Supreme Court and cause remanded to District Court for submission of administrative question to the Interstate Commerce Commission. *General American Tank Car Corporation v. El Dorado Terminal Company* (1940), 308 U.S. 422, 60 S.Ct. 325, 84 L.Ed. 361.

1940—Appellant's petition for rehearing denied by United States Supreme Court without opinion. *General American Tank Car Corporation v. El Dorado Terminal Company* (1940), 309 U.S. 694, 60 S.Ct. 465, 84 L.Ed. 1035.

1940—Petition filed by appellant with the Interstate Commerce Commission for a determination of the legality of the payments sought in both assumpsit actions

1940-1941—Hearing and argument before Interstate Commerce Commission.

1944—Decision by the Commission that the payments sought in these actions would be illegal rebates. *Allowances for Privately Owned Tank Cars* (1944), 258 I.C.C. 371.

1944—Complaint filed by appellant in statutory three-judge District Court to set aside Commission's order.

1945—After hearing, judgment entered by three-judge District Court dismissing complaint. *El Dorado Oil Works, et al. v. United States, et al.,* (D.C., N.D. Cal., 1945), 59 F.Supp. 738.

1946—Judgment of three-judge District Court reviewed and affirmed by United States Supreme Court on the merits. *El Dorado Oil Works, et al. v. United States, et al.* (1946), 328 U.S. 12, 66 S.Ct. 843, 90 L.Ed. 1053.

1946—Judgment for defendants entered by three-judge District Court pursuant to Supreme Court's 1946 mandate.

1946—Pre-trial conferences in both actions in the District Court during which the parties stipulated that the two actions are alike and that whatever order should be made in the first action should likewise be made in the second (R. 109-110).

1946—Judgments for defendants in both assumpsit actions entered by District Court in conformity with Supreme Court's mandates of 1940 and 1946 (R. 46 and 113).

1947—Appellees' motion to dismiss these appeals denied by this Court (the order was made May 5 instead of June 5 as stated at page 2 of Appellant's Opening Brief).

Statement of the Case

With one important exception discussed below, and with certain minor exceptions enumerated in the footnote,* we

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*(a) The period covered by the second action is May 31, 1935 to January 31, 1937 (R. 91-97), rather than May 31, 1934 to January 1, 1937, as stated on page 2 of Appellant's Opening Brief.

(b) The term of the contract was three years instead of two, as stated on page 3 of Appellant's Opening Brief—see the full text of the contract in the printed Record, at pages 20 to 28, particularly the Fourth Paragraph at R. 24.

(c) The second date mentioned near the middle of page 4 of Appellant's Opening Brief should be May 31, 1935, instead of May 31, 1945 (R. 2 and 29).

(d) The investigation by the Interstate Commerce Commission was not "limited" as stated near the top of page 5 of Appel-

are content to accept as adequate for the purpose of these appeals the "Statement of the Case" appearing upon pages 3 to 7 and the preliminary paragraph on pages 1 and 2 of Appellant's Opening Brief. More complete recitals of the factual background and history of this controversy may be found in the five reported opinions heretofore rendered at successive stages of this litigation, all cited above in the chronological outline at pages 3 and 4 hereof.

As previously noted, we disapprove of appellant's "Statement of the Case" in one important respect. We refer to appellant's failure to disclose the significance of the two reports and orders of the Interstate Commerce Commission bearing directly upon this controversy. Appellant does not even mention the first report of the Commission though it was the immediate cause of this litigation. Appellant does mention the Commission's later report and order ruling upon this very controversy, but appellant's reference to it is altogether inadequate—appellant says merely that "on April 10, 1944, the Commission released a decision and order" (App. Op. Br. 5), without stating the nature of the decision or the substance of the order. These two determinations of the Interstate Commerce Commission are of primary significance. Yet appellant completely ignores the first and virtually ignores the second!

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lant's Opening Brief. It was fully responsive to appellant's petition for an investigation. Appellant was in no wise restricted in the presentation of its case. The proceeding was a complete investigation of the lawfulness of the practices disclosed by these actions, and all railroads concurring in the relevant tariffs were parties respondent (258 I.C.C. 370, 373-4).

The first of these two Commission reports—the one to which we have referred as the immediate cause of this litigation—was in

Use of Privately Owned Refrigerator Cars (1934), 201 I.C.C. 323.

That decision was released on July 2, 1934. It was concerned with refrigerator cars rather than tank cars, but in all important respects it dealt with facts and practices substantially similar to those here involved. The nature of that decision, and the effect of it upon the present controversy, are described by the Supreme Court in its first opinion in this litigation as follows:

> "The petitioner [appellee herein] complied with the provisions of the agreement until July 2, 1934, when the Interstate Commerce Commission rendered its decision in Use of Privately Owned Refrigerator Cars, 201 I.C.C. 323, in which it considered the payment of mileage allowances to shippers either directly or through car owners, which payments exceeded the total of the agreed rental for the use of the cars and any additional actual expenses of the shipper in connection with the cars. In that case the Commission held that such payments operated to give the lessee transportation of his products at lower rates than those paid by other shippers who use cars furnished by the carriers and thus amounted to a rebate from the published transportation rates. The petitioner's practice had been to collect the mileage, deduct the rental due, and pay over the balance monthly. After the rendition of the Commission's decision the petitioner collected the mileage from the railroads, credited the Oil Works [appellant herein] with the rental due, retained the

> balance, and refused to pay it over. The ground of its refusal was that to follow the former practice would render it a participant in illegal rebating." (308 U.S. at 426)

Appellee's discontinuance of excess mileage payments to appellant in July, 1934, occurred immediately after the announcement of the *Refrigerator Car* decision on July 2, 1934, and as a direct consequence thereof. The parties have stipulated that such was the reason for appellee's action, that in so doing appellee acted upon advice of counsel, and that a full copy of the Commission's report and order in the *Refrigerator Car* case should be incorporated in the record (R. 31). Appellant's omission of any reference to this report would lead one to assume that appellee's discontinuance of the excess mileage payments was arbitrary and without reasonable cause (see App. Op. Br., pp. 3-4). The stipulated and undeniable facts are, of course, quite to the contrary.

The second of the two Interstate Commerce Commission decisions, which appellant so lightly passes over in its recital of the history of this litigation, is the report and order passing upon the validity and reasonableness of the very payments which appellant is here seeking to recover:

> *Allowances for Privately Owned Tank Cars* (1944), 258 I.C.C. 371.

We have already noted that appellant misdescribes the Commission's proceeding as a "limited" investigation when in fact it was not limited. But more important is appellant's failure to reveal what the Commission held! It held that the payments which appellant is here seeking

to recover would, if made, be illegal—that they would "constitute a rebate and discrimination and involve a departure from the tariff rules applicable * * *", in violation of the Elkins Act and the Interstate Commerce Act. The Commission expressly approved "the principles applied in the *Refrigerator Car Case* as related to the situation here involved" (258 I.C.C. at 380), viz., the tank car leasing arrangement between appellant and appellee. The significance and controlling effect of this decision must be obvious.

Again, appellant understates the Supreme Court's decision in relation to the Commission's order. The Court did not hold merely that the Commission "had determined the questions submitted to it by the previous decision of the Court" (App. Op. Br. p. 5). The Court went much further and, after disposing of appellant's diverse attacks upon the soundness and propriety of the Commission's action, held in express words "that the Commission's order is valid" (328 U.S. at 22).

Certainly a recital of what the Commission decided and what the Supreme Court said of its decision must be presented to this Court in order that it may determine whether the District Court acted properly in concluding that the "sole issue in this cause has been conclusively determined in favor of the defendant [appellee herein] and against the plaintiff [appellant herein] by the Interstate Commerce Commission" (R. 38), and that "there are no facts to be determined by the court in this litigation" (R. 44).

The foregoing will, we think, supply the important historical facts omitted from appellant's "Statement of the Case."

The Question

The question for decision is whether the District Court erred in declining to retry an issue—the sole issue in the case—which the Supreme Court had held to be an administrative question for determination exclusively by the Interstate Commerce Commission and which the Interstate Commerce Commission had finally determined in a decision approved on the merits by a second opinion of the Supreme Court.

If the District Court was bound to undertake to try that issue, after the Supreme Court had held it must not do so and had later upheld as valid the determination of that issue by the Interstate Commerce Commission, then these judgments should be reversed. Otherwise, they should be affirmed.

ARGUMENT

I.

There Was No Untried Issue Before the District Court

For reasons not clear to us, the appellant has seen fit to present its entire argument without a single reference to the decision by the Interstate Commerce Commission, adverse to appellant, upon the very issue which the appellant insists has never been tried. Appellant wholly ignores that decision. If one were to accept appellant's argument at face value one would assume that the lower court had summarily ordered a dismissal of a case which was at issue and had never been tried, either in the same court or elsewhere. Such is not the situation.

Entirely incomprehensible are the assertions in Appellant's Opening Brief (pages 8 and 12) that we have "admitted" that the issue is untried. Those assertions are contrary to fact. There has been no such admission on the part of appellee.

Our contention has been and is that the issue had been tried and decided by the only tribunal competent to do so—the Interstate Commerce Commission—and that there was literally nothing left to be tried by the District Court. For this purpose we shall briefly review the prior proceedings. Before doing so, however, we wish to emphasize the fact that the *only* issue in these cases is the single one raised by appellee's affirmative defense, namely, the issue whether the payment of the sums in dispute is prohibited by the provisions of the Elkins Act forbidding rebates, concessions and discrimination (Act of February 19, 1903,

Chap. 708, §1, 32 Stat. 847, 49 U.S.C. §41(1) and (2)). The parties have stipulated that this is the only issue in both cases (R. 38 and 110), and there can be no misunderstanding on that score. (See Appellant's Opening Brief, page 6, to the same effect.)*

The First Trial.

The first event which should be considered is the first trial of this issue in the District Court. That was a complete trial of the issue, the court sitting without a jury and making both findings of fact and conclusions of law. The decision on this issue was in favor of the appellee. The District Court held that the payment of the amounts sought would constitute unlawful rebates in violation of the Elkins Act. Judgment was accordingly entered for the appellee. (See the description of this trial and decision in the opinion of this Court reversing that judgment, 104 F. (2d) 903.)

In other words, the District Court in that trial some ten years ago did try and decide exactly the same issue which the appellant now contends it should try again!

The First Supreme Court Opinion.

After reversal by this Court, the case reached the Supreme Court by writ of *certiorari*. In due time the Supreme Court rendered its unanimous opinion (308 U.S. 422)—its first opinion in this litigation—reversing the

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*The single issue in this litigation is characterized in appellant's brief as "an issue of fact" (pp. 8, 10, 11). Whether it be an issue of fact or an issue of law is immaterial. It is enough that the issue was held by the Supreme Court to have been "subjected by the Interstate Commerce Act to the administrative authority of the Interstate Commerce Commission."

decision of this Court and remanding the case to the District Court for further proceedings in conformity with its opinion.

The substance of the Supreme Court's opinion is briefly stated in the concluding paragraphs, as follows (omitting footnotes):

> "* * * If it should appear that, with respect to the tank cars in question, the shipper-lessee is making substantial profits on leased cars, by reason of the excess of the mileage allowances over the rentals paid, it might in the light of all the facts be found that the shipper is, in the result, obtaining transportation at a lower cost than others who use cars assigned them by the carriers or own their own cars. The Commission has found that, in the case of refrigerator cars, held under similar leases, this has been the case. The inquiry into the lawfulness of the practice is one peculiarly within the competence of the Commission.
>
> "As the tariffs now contain no provision for the payment of car mileage allowances by the railroad to the shipper directly, and as, upon the face of things as disclosed by this record, the shipper is apparently reaping a substantial profit from the use of the cars, a clear case is made for the exercise of the administrative judgment of the Commission. The Circuit Court of Appeals, without supporting evidence in the record as to any specific items, said that there are obviously other expenses which the shipper must bear over and above the actual rental paid. If this were so, the reflection of those expenses, as well as the rental itself, in the allowance paid by the carrier to the shipper for the use of the latter's cars, would be a matter for the administrative judgment of the Commission and not for determination by a court.

"We have said that the Commission insists the District Court was without jurisdiction of the cause. With this we do not agree. The action was an ordinary one in assumpsit on a written contract. The court had jurisdiction of the subject matter and of the parties. But it appeared here, as it did in *Mitchell Coal Co. v. Pennsylvania R. Co.* 230 U.S. 247, that the question of the reasonableness and legality of the practices of the parties was subjected by the Interstate Commerce Act to the administrative authority of the Interstate Commerce Commission. The policy of the Act is that reasonable allowances and practices, which shall not offend against the prohibitions of the Elkins Act, are to be fixed and settled after full investigation by the Commission, and that there is remitted to the courts only the function of enforcing claims arising out of the failure to comply with the Commission's lawful orders.

"When it appeared in the course of the litigation that an administrative problem, committed to the Commission, was involved, the court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act. There should not be a dismissal, but, as in *Mitchell Coal Co. v. Pennsylvania R. Co.,* supra, the cause should be held pending the conclusion of an appropriate administrative proceeding. Thus any defenses the petitioner may have will be saved to it.

"The judgment of the Circuit Court of Appeals is reversed and the cause is remanded to the District Court for further proceedings in conformity to this opinion.

"Reversed." (308 U.S. 431-433)

Particular attention is directed to the statement that the only function of the courts is to enforce claims arising out of failure to comply with the Commission's lawful orders, and the statement that the reason for not ordering an outright dismissal is to save to the petitioner (appellee herein) any defenses it may have. In the latter connection the Court referred to the somewhat similar case of

> *Mitchell Coal and Coke Company v. Pennsylvania Railroad Company* (1913), 230 U.S. 247, 33 Sup. Ct. 916, 57 L.Ed. 1472,

wherein the Supreme Court concluded its opinion with the following sentence:

> "But owing to the peculiar facts of this case, the unsettled state of the law at the time the suit was begun and the failure of the defendant to make the jurisdictional point *in limine* so that the plaintiff could then have presented its claim to the Commission and obtained an order as to the reasonableness of the practice or allowance,—direction is given that the dismissal be stayed so as to give the plaintiff a reasonable opportunity within which to apply to the Commission for a ruling as to the reasonableness of the practice and the allowance involved; and, if in favor of the plaintiff, with the right to proceed with the trial of the cause in the District Court, in which the defendant shall have the right to be heard on its plea of the statute of limitations as of the time the suit was filed and any other defense which it may have." (230 U.S. at 266-267)

The conclusions necessarily to be drawn from the Supreme Court's first opinion are: *first,* that the Dis-

trict Court erred in trying the issue raised by the affirmative defense under the Elkins Act; *second,* that the issue should be referred to and decided by the Interstate Commerce Commission; *third,* that if the Commission should hold in favor of the appellant, viz., that the payments sought would not be rebates, then the case should proceed to a retrial in the District Court so that any other defenses the appellee might have could be presented and considered; and *fourth,* that if the Commission should rule in favor of the appellee, viz., that the payments would be rebates and therefore unlawful, then the appellant could not recover in any event and the District Court would have no further function to perform.

For purposes of the present appeals it is of utmost importance to observe the first of these four conclusions, namely, that the District Court erred in undertaking to try the issue raised by the affirmative defense under the Elkins Act. The significance of such holding must be obvious: the Supreme Court squarely held that the District Court erred in trying the very same issue which appellant now contends the same court erred in refusing to try again! This decision of the Supreme Court is more than an apt precedent, or a "case in point"—it is a decision on the identical question and in the identical action here involved. It is the "law of the case."

The Interstate Commerce Commission Proceeding.

After the remand to the District Court, appellant filed a petition with the Interstate Commerce Commission seeking a determination by it of the same issue which the District Court had tried, which the Supreme Court had

held could not be tried by a court, and which appellant now contends the District Court should try again—namely, the issue of whether the payments here sought could be made lawfully or would violate the Elkins Act. The prayer of the appellant's petition to the Commission is quoted in full in the Commission's report, as follows:

> "Wherefore, the petitioners pray that the Commission cause an investigation to be made of the practices disclosed by the said action, and in the said opinion of the United States Supreme Court, and after such investigation and such hearing as the Commission may desire, the Commission enter its order holding that payment by the General American Tank Car Corporation to petitioners of the amounts so collected by said tank car corporation as mileage allowance for the use of the tank cars leased by petitioners and furnished by them to the railroad carriers may be made as provided in and for the entire period covered by the agreement of the parties dated September 28, 1933, without the violation of any provisions of the Elkins Act, and that the payments so made are reasonable and will not accomplish a rebate, concession or an advantage or discrimination in favor of either of the petitioners or in violation of the provisions of the Elkins Act, and that such other and further order or orders be made as the Commission may consider proper in the premises." (258 I.C.C. at 373)

Upon that petition the Interstate Commerce Commission made an order of investigation to determine:

> "(1) whether the practices involved under the terms and operations of the lease contract are unlawful in violation of the Interstate Commerce Act;

"(2) whether a reasonable charge or allowance may be paid, and, if so, the amount thereof as a maximum to be paid, by the carrier or carriers by railroads for the use of the tank cars furnished such carriers by petitioners for the transportation of the products of petitioners in interstate commerce from Berkeley and Oakland, Calif., in the period January 1, 1934, to December 31, 1936; and

"(3) what findings shall be made, or what rules, regulations, or practices shall be prescribed, or what orders shall be entered, to remove any unlawfulness that may be found to exist." (258 I.C.C. at 374)

In its report the Commission expressly embraced any questions arising under the Elkins Act as well as those under the Interstate Commerce Act (258 I.C.C. 374).

As recited in the Commission's report, the Commission held a hearing, in which the parties to this litigation as well as all affected railroads participated. Briefs were filed, a proposed report was issued, exceptions and replies were filed, and oral argument was heard. Finally, on April 10, 1944, the Commission issued its report which is reproduced in full in the official reports of the Commission (258 I.C.C. at pages 371 to 388). The Commission determined that the payments demanded in the two actions (i.e., the excess of the mileage payments over and above the lease rental) "* * * would, in our opinion, constitute a rebate and discrimination and involve a departure from the tariff rules applicable, prohibited by section 1 of the Elkins Act, and section 6(7) of the Interstate Commerce Act, and we so find" (258 I.C.C. at 377).

The parties have stipulated herein that the Court may take judicial notice of the Commission's report and its

concurrent order discontinuing the proceeding (R. 37 and 109). Appellant filed a petition for rehearing which the Commission denied on July 31, 1944.

The Commission summarized its analysis of the issue in the following paragraph near the end of its report:

> "The present record shows how under contracts such as the one between the Oil Works [appellant herein] and the Tank Car Corporation [appellee herein], the Oil Works, as shipper, would reap a profit on the leased cars so substantial in amount, if paid over by the rail carriers out of the transportation charges through the Tank Car Corporation to the Oil Works, as to have the result of enabling the Oil Works thereby to obtain the transportation of the commodity it ships in interstate commerce at a lower cost than others who use cars assigned to them by the carriers, or who own their own cars. It shows that the abuses found to exist as to refrigerator cars would measurably exist under the terms of the contract, if such terms were observed. We therefore approve the principles applied in the *Refrigerator Car Case* as related to the situation here involved." (258 I.C.C. at 379-380)

The report of the Commission ended with the following findings and conclusions:

> "We therefore conclude and find:
>
> "(1) That the rental paid or to be paid by El Dorado Oil Works to General American Tank Car Corporation under the terms of the lease agreement between those parties, dated September 28, 1933, was the only cost incurred by the former in furnishing the tank cars in which its shipments moved. A just and reasonable allowance as a maximum to have been paid by the respondents, rail carrier or carriers, to the

Oil Works for the furnishing of such cars would have been an amount not to exceed such rental. Such an amount and allowance has been paid to the Oil Works through credits made to the account of the Oil Works by the Tank Car Corporation.

"(2) That an allowance to the Oil Works by the respondents, rail carrier or carriers, or by the Tank Car Corporation, under the agreement; in excess of said rental would be unjust and unreasonable, and would unduly prefer the Oil Works as a shipper of its commodities transported by it in the tank cars herein involved. The amount paid by the Tank Car Corporation to the Oil Works prior to July 1, 1934, under the terms of the agreement, to the extent it was in excess of the rentals due thereunder, was unjust and unreasonable, and unduly preferred the Oil Works as a shipper of its commodities.

"(3) That the Oil Works is entitled to no allowance from the respondents, rail carrier or carriers, directly or through the Tank Car Corporation, for the special cleaning and preparation of the tank cars during the period of the agreement, January 1, 1934, to December 31, 1936.

"On [*Sic*] order will be entered discontinuing this proceeding." (258 I.C.C. at 380-381)

This determination is a complete disposition of the issue which the appellant now says has never been tried. The Commission held, in express terms, that the amount of the car rental was the maximum amount which could lawfully be paid to the appellant under the agreement between the parties, and that that amount had already been paid. There is, then, no further amount which can be paid without violating the law by enabling the appellant to se-

cure an illegal freight advantage over its competitors through profiting on its car rental arrangements.

Three-Judge Court Proceeding.

Not content with the Commission's determination, the appellant in 1944 commenced an action in the District Court attacking the Commission's order under the provisions of the Urgent Deficiencies Act of 1913 (38 Stat. 219, 28 U.S.C. §41(28), §43 and §48). Three judges heard the cause. The court held that it was without jurisdiction to pass upon the Commission's order and dismissed the action (59 F. Supp. 738).

The Second Supreme Court Decision.

On a direct appeal by the present appellant from the judgment of the three-judge court, the Supreme Court rendered its second opinion in this litigation (328 U.S. 12). It held that the three-judge court had erred in declining jurisdiction, and it then proceeded to consider the Commission's order on the merits. The Supreme Court first considered and rejected appellant's contention that the Commission had exceeded its authority in undertaking to determine the justice and reasonableness of allowances which appellant was to receive on past transactions. On this subject the Court said in part:

> "On the merits, appellants' major contention is that the Interstate Commerce Act and our earlier opinion in this case do not authorize the Commission to determine, as it here has done, the justice and reasonableness of mileage allowances which appellants were to receive on past transactions. The contention is that both our opinion and the Act authorize the Commission to do no more than determine what

uniform allowance shippers as a class would be permitted to charge in the future. In part the argument is that insofar as the order is based on a treatment of shipper-lessees as a class apart, and on a limitation of their allowance to the cost to them of the cars they furnish, the order is invalid, in that it neither rests on, nor brings about, a uniform rate to all shippers, or even all shipper-lessees. We cannot agree with the above contentions.

"First, it must be noted that the Commission made its determination as to the lawfulness of these past practices on the basis of appellants' own application, asking the Commission to do so. Second, our previous opinion, as well as the Interstate Commerce Act, authorized the Commission to make this determination. The question before us when this case was first here did not relate to future but to past allowances. Relying on past decisions, we held that the 'reasonableness and legality' of the past dealings here involved were matters which Congress had entrusted to the Commission. See e.g., *Great Northern R. Co. v. Merchants Elevator Co.* 259 U.S. 285, 291, [63 L.Ed. 943, 946, 42 S.Ct. 477, 479], and other cases cited in our previous opinion. And we rejected appellants' petition for rehearing which presented substantially the argument now repeated, namely that any order the Commission might make 'could only be effective as to the future,' that the Commission's determination 'could not affect the contract . . . in this case,' that the Commission's action would be 'futile,' and that consequently our judgment and opinion would provide no 'guidance' for the District Court. Our first opinion, buttressed by our rejection of the motion for rehearing, was a plain authorization for the Commission to determine the justice and reasonableness of the past allowances to this shipper. The Commission did not

have to establish future uniform rates to determine the questions we sent to it. Consequently, insofar as appellants' argument is that the Commission failed to treat all shippers or all shipper-lessees uniformly because it did not fix future uniform rates, the answer is that it was not required to do so." (328 U.S. at 19-20)

The Supreme Court then considered appellant's other attacks upon the Commission's determination, including appellant's attack upon the sufficiency of the evidence. The Court held "that the Commission's order is valid" (328 U.S. 22) and affirmed the judgment of dismissal expressly on that ground. In its opinion the Supreme Court said further:

"* * * For supplying these cars, it [the "Oil Works", appellant herein] could not consistently with §15(13), receive from the railroad, directly or indirectly, more than a 'just and reasonable' allowance. This allowance was 'in respect to transportation.' See *Union Pacific R. Co. v. United States,* supra, 462 [313 U.S. 450, 61 S.Ct. 1064, 1072, 85 L.Ed. 1453, 1464]. Payment by the railroad of more than the just value of the services inevitably resulted in its carrying Oil Work's product at less than the regular freight rate, even though it collected the full rate from the consignees. The reduced rate at which Oil Works could thus have its products transported justified the Commission's finding that Oil Works got a concession and an advantage over other shippers who made no such profits on tank cars. Whether Oil Works or its consignees paid the freight makes no difference. Cf. *Elgin J. & E. R. Co. v. United States*

> [(C.C.A. 7th)] 253 F. 907, 911. A practice which accomplishes this result is prohibited by the Interstate Commerce Act and the Elkins Act." (328 U.S. at 22)

We pause briefly to point out here that it is exactly that "concession" and that "advantage over other shippers" which appellant is still trying to realize in these appeals. If the Court believes that the appellant should be entitled to go forward with actions for sums so characterized by the Supreme Court of the United States, in approving the final determination of the Interstate Commerce Commission holding that payment of such sums would be unlawful, then, but only then, the Court should reverse the judgments.

Termination of Action in Three-Judge Court.

Upon receipt of the mandate from the Supreme Court following its second opinion, the District Court of three judges on July 19, 1946, made and entered its "Order on Mandate" dismissing the appellant's complaint. The parties have stipulated (R. 38 and 109) that the Court may take judicial notice of that Order on Mandate, which is important here because it constitutes the final termination, at long last, of the "appropriate administrative proceeding" called for by the first Supreme Court opinion in 1940 (308 U.S. at 433).

Further Proceedings in the Assumpsit Actions.

As matters then stood, the District Court had before it in the assumpsit actions the final and judicially approved determination by the Interstate Commerce Commission of the sole issue in the case, namely, the defense under the

Elkins Act. The Commission had determined that issue against the appellant, holding in express terms that no amounts could lawfully be paid under the agreement over and above what had already been paid. Nothing could be paid on appellant's claims, in other words, without violation of law. That determination established the validity of the appellee's defense *in toto,* and it was in and of itself a complete and final answer to appellant's claims.

Upon that state of the record there was plainly nothing further for the District Court to do except enter judgment for the appellee in conformity with the determination by the Commission. Since that determination was in favor of the appellee there was no occasion for the District Court to consider the appellee's other defenses, as the Supreme Court had said the District Court might be called upon to do if the administrative determination should have turned out the other way (308 U.S. at 433). There was not even any occasion for the District Court to examine into the validity of the Commission's order, for the appellant had seen fit to test the order in a three-judge court action which had resulted in a full examination and approval of the order by the Supreme Court (328 U.S. 12).

There was, then, no "untried" issue. The only issue in the case had been "tried" and decided by the only tribunal competent to decide it, the Interstate Commerce Commission. It would have been reversible error for the District Court to retry the issue, just as it was held in error for having tried it in the first instance (308 U.S.

422). Nothing whatever remained for the Court to do except to dismiss the cases.*

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*Appellant's brief (p. 12) advises that, if trial had been permitted, it could have been proven "that appellant would enjoy no rebate, concession or discrimination prohibited by the Elkins Act * * *" through the payments sought from appellee. (It will be noted that the appellant has here defined the precise issue, under the Elkins Act, which the Commission was called upon to determine.) Appellant adds: "Such a showing would completely dispose of appellee's special defense and the issue raised thereby." But the Commission has already disposed of this "special defense and the issue raised thereby," and has done so authoritatively and finally.

Appellant has thus made it exceedingly clear that it endeavored, although unsuccessfully, to persuade the District Court to retry the exact issue which was entrusted to the Commission and which was decided by the Commission. The Court's attention should be drawn to the admission of appellant's counsel in the course of pre-trial that he was "*unfortunately in the position of having to find fault with the Supreme Court's theory of it, and also the theory of the Interstate Commerce Commission*" (R. 56). (Emphasis supplied)

findings. Neither these cases nor the general rule which they apply can be said to be pertinent here, for the following reasons, any one of which is sufficient alone:

(a) Here the District Court held no trial—the Supreme Court had forbidden it to try the only question at issue.

(b) Here the only issue had been heard and conclusively determined by another tribunal, the Interstate Commerce Commission, which had made its own findings and conclusions (258 I.C.C. 371, at 380-381), and that determination had been approved on the merits by the United States Supreme Court (328 U.S. 12).

(c) Neither findings nor conclusions are necessary in summary judgment proceedings (which, as the appellant says on page 10 of its brief, are not materially different from the pre-trial proceedings here involved).

Lindsey v. Leavy (C.C.A., 9th Cir., 1945), 149 F. (2d) 899 at 902:

> "Since a summary judgment presupposes that there are no triable issues of facts, findings of fact and conclusions of law are not required in rendering judgment, although the court may make such findings with or without request. Failure to make and enter findings and conclusions is not error."

See also

Burman v. Lenkin Const. Co. (C.A.D.C. 1945), 149 F. (2d) 827;

Prudential Insurance Co. of America v. Goldstein, (S.D. N.Y. 1942), 43 F. Supp. 767.

Clearly, the general rule requiring findings and conclusions has no application here. The Interstate Com-

merce Commission had made detailed findings of fact upon the issue under the Elkins Act (258 I.C.C. at 380-381), and the United States Supreme Court had held those findings were supported by the evidence (328 U.S. at 22). Not only was it unnecessary, but it would have been reversible error for the District Court to make findings on issues which it could not try in the first instance and which had in fact been conclusively determined by the appropriate tribunal. The District Court did all that was demanded of it when it referred in its pre-trial orders to the proceedings by which appellee's affirmative defense had been fully and finally established as a complete bar to these actions. There was no duty imposed upon it to make any findings of fact.

CONCLUSION

In its first opinion some seven years ago the Supreme Court held that the only issue in these cases could not be tried by the court but was an "administrative problem" committed by law to the exclusive jurisdiction of the Interstate Commerce Commission. It ordered the District Court to "stay its hand" pending the conclusion of an "appropriate administrative proceeding" for determination of that issue.

The District Court duly stayed its hand until there were presented to it, in 1946, an opinion and order of the Interstate Commerce Commission conclusively determining that sole issue and a second decision of the United States Supreme Court approving that determination on the merits. The District Court then satisfied itself that the Commission's determination had been in favor of the appellee and that there was no further action required of the Court. It proceeded without further delay to order judgments for the appellee in conformity with the Commission's determination.

The appellant's primary contention is that the Court should have undertaken to retry the issue which had been tried and set at rest by the Interstate Commerce Commission. The Court had once before undertaken to try that issue, and the Supreme Court had held in its first

opinion that this was error. Certainly, the Court's refusal to repeat the same error was proper.

The judgments should be affirmed.

Respectfully submitted,

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